



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 9 OF 2019

**IN THE MATTER OF ARTICLE 3 (1), 22(1), (2) (a) (b) & (c) AND 258 (1) & 2(a) (b) & (c) OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF 1(1), 3(c), (4), (2) (4) & (5), 28, 29(d) & (f), 40(1) & (3), 42, 48, 50(1), 56(d), 60(1) (a) (b) (c) (d) & (c), 61, 63 (1)
(2) (d) (3) (4) & (5), 67 (1) (2) (b) (c) (d) & (h), 69 (a) (d) (g) & (2), 70, 159 (1) & (2), 162 (1) (2) & (3), 165 (5) (b), 258 & 259 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 6(1) & (8), 21 & 23 OF THE COMMUNITY LAND ACT, 2016

AND

IN THE MATTER OF SECTION 2 OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT 2013

AND

IN THE MATTER OF SECTION 1, 2, 14 & 22(1) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE RIGHTS

ABDULLAHI HAJI GOBOJE.....1ST PETITIONER

RASHID SUSA DIBA.....2ND PETITIONER

DIBA KAMAYO SARITE.....3RD PETITIONER

MOHAMED HASSAN MOHAMMED.....4TH PETITIONER

HALKANO HUKA WADA.....5TH PETITIONER

JIMALE GOLICHA GUYO.....6TH PETITIONER

PETER EKAL.....7TH PETITIONER

MOHAMMED ABDI AHMED.....8TH PETITIONER

VERSUS

CABINER SEC FOR LANDS &

PHYSICAL PLANNING.....1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

1. This ruling relates to the Application filed by the petitioners on 6.5.2019 and the notice of the Preliminary Objection filed by the 4th Respondent which is dated 21.5.2019. The 1st and 2nd respondents (The Nationa Government) has associated themselves with the arguments of the County Government of Isiolo (4th respondent) in so far as the application and the preliminary objection are concerned, the 3rd respondent

(The National Land Commission) has not come on record in this matter, while the 5th respondent (the couy government of Mery) was removed from these proceedings on 22.5.2019.

The Notice of Motion dated 6/05/2019

2. The petitioners/ applicants are seeking amongst other orders, a mandatory order compelling the respondents to freeze all activities relating to the adjudication and titling within Ngaremara, Attan, Gottu & Nakuprat locations; and a temporary injunctive order directing the respondents to cease and desist from engaging in all activities and processes which relate to the ongoing land adjudication and titling processes of Ngaremara, Attan, Gottu & Nakuprat locations.

3. The grounds upon which the application is premised upon are set out in its body and in the joint supporting affidavit of Jimale Guyo, Mohamed Abdi Ahmed and Peter Ekai sworn on 6/05/2019. It is contended that petitioners are residents of Ngare Mara , Attan, Gotu and Nakuprat areas (the suit land) which lies within Ngare Mara Ward of Isiolo North Constituency, Isiolo County. These deponents aver that the area is occupied predominantly by semi-nomadic pastoralist communities of Borana, Turkana and Somali ethnic groups. The suit land is unregistered community land which is held in trust on behalf of these communities by the County Government of Isiolo.

4. Around the year 2011, people from neighboring counties started settling within these locations. Over time their numbers increased surpassing the area's original inhabitants. The new comers have now claimed ownership locking out the original residents of the area, notwithstanding the area's pastoral significance to these indigenous communities.

5. Further, the petitioners point put that the area has ecological significance as a wildlife conservation corridor for the Shaba Game Reserve. The privatization of the suit land will lead to environmental degradation, therefore making it impossible for the present generation to pass on the rich environmental heritage to the future generations.

6. On 21/11/2018 the Isiolo County Commissioner and local chiefs communicated the government's intention to undertake adjudication exercise over the land in Olonyiro, Ngare Mara & Kiina Wards. The petitioners fear is that this adjudication is aimed at issuance of individual titles for the Location which will convert community land into private land. The petitioners contend that the suit land has historically always been community land for common grazing and watering by the communities and therefore wish that the land remain as such. Conversion of the area would require effective participation and concurrence of all members of the local communities and the same cannot be imposed upon them without their informed consent as is being undertaken presently. The petitioners fear the outcome of the ongoing land adjudication and ultimate titling which would prejudice them and kill their claims to the Locations.

The Preliminary Objection dated 21/05/2019

7. The 4th respondents have raised this Preliminary Objection on the grounds that the court lacks jurisdiction courtesy of the provisions of ***Sections 26, 29 and 30 of the Land Adjudication Act.***

8. Both the application and the Preliminary objection were canvassed by way of written submissions. The petitioners submitted that the preliminary objection is based upon wrongful basis for the petition pending before the court is not an objection to an ongoing land adjudication process, rather, they are seeking the court's intervention over ongoing violations of the petitioners' bill of rights and fundamental freedoms. That as per Section 7 of the ***Sixth Schedule to the Constitution*** it is provided that pieces of legislation enacted prior to the date of the promulgation of ***the Constitution of Kenya 2010***, such as ***the Land Adjudication Act***, are to be interpreted with the necessary alterations, adaptations, qualifications and exceptions in order to bring them into conformity with ***the Constitution***. Therefore, even though ***the Land Adjudication Act*** confers the cabinet secretary jurisdiction to hear parties aggrieved by land adjudication processes, he may not deal with any grievances arising from adjudication processes which precipitate violations and or threaten violations of human rights and fundamental freedoms. The petitioners relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014]eKLR** and **Communications Commission of Kenya & 5 others v Royal Media services Limited & 5 Others [2014] eKLR** to support their claim.

9. The 4th respondent submitted that the petitioners' petition attempts to nullify an ongoing adjudication process within an adjudication section. That this court lacks jurisdiction to entertain the petition according to ***Section 26, 29 and 30 of the Land Adjudication Act*** which has laid down the procedure of dealing with disputes, hence the petition is premature. Moreover, according to ***Section 30 of the Land Adjudication Act***, consent is mandatory when one seeks to lodge any manner of proceedings in court which the petitioners do not have. The 4th respondent made reference to the case of **Felix Kaunda Lenamparasio & 3 others v Attorney General & 5 others [2018] eKLR** and **William Mutuura Kairiba v Samuel Nkari & 2 others [2018] eKLR** to support their case.

Determination

10. I have found it necessary to deal with both the application and the preliminary objection at the same time. I am aware that Adjudication is a process anchored under the statutes, which entails a very elaborate and rigorous exercise. The main statutes which deal with matters

adjudication are the **Land Adjudication Act**, the **Land Consolidation Act**, and the **Community Lands Act**.

11. The **Community Lands Act** in particular provides transitional provisions, whereby Sections 46 (6) (7) provides as follows;

“For the avoidance of doubt, the Cabinet Secretary shall develop the adjudication programme and ensure that the new and existing adjudication programme shall, subject to this Act, be governed by the law applicable to it immediately before to the commencement of this Act and shall be concluded within three years of the enactment of this Act.

If at the lapse of the time specified by the Cabinet Secretary under subsection (6) there is any adjudication programme not finalized, the Cabinet Secretary shall gazette new completion dates and finalize the registration under the provisions of this Act”.

12. The petitioners want the adjudication process halted, whereas the respondents want the petitioners to follow the dispute resolution mechanisms provided for under the Land Adjudication Act. My question is ***“under which legal regime is the alleged adjudication process being under taken?”***

13. In ground no. 11 of the petitioners application it is stated as follows:

“The aforementioned assertion is particularly reinforced by the fact that on the 21.11.2018 the Isiolo County Commissioner and the local chiefs communicated the government’s intention to undertake adjudication exercise over the land in Olonyiro, Ngaremara and Kina wards. This exercise is intended to be undertaken within 100 days through the government’s rapid results initiative”.

14. From the material presented before me many questions arise i.e. *has the adjudication process started, if it has, under which law?. Futher, was there a gazette notice declaring the affected areas as adjudication sections ?*. A notice declaring an area as an adjudication section would usually contain particulars of the areas affected and the law to be applied. The process of adjudication itself is rather elaborate as stated earlier herein, where committees have to be appointed and the process of demarcation and recording of rights and interests in land is conducted culminating in registration of such rights and generation of the relevant maps. That process as is known in the relevant statutes does not and cannot take 100 days! To be completed. Thus the argument by the petitioners that the process was to take 100 days is not anchored on the law as we know it.

15. This court is in the dark as to which law is applicable in so far as the alleged process is concerned. The petitioners have not availed any documents to show that a notice of declaration has been issued. The court is left to speculate on what is ongoing. The court cannot purport to stop that which it does not know. Likewise, the court cannot refer the dispute to the mechanisms provided under the Land adjudication Act for the reason that parties need to avail further particulars on the issue of the applicable law.

16. I notice that the pleadings have not closed and as such I have not been able to grasp the position of the respondents in so far as the petitioners claim is concerned. It is therefore too early to determine the merits of the preliminary objection at this stage.

17. In **Meru Petition no. 7 of 2017; County Government of Meru & Another vs. District Land Adjudication and Settlement Officer Tigania East Sub County & 18 Others (2018) eKLR**, I was dealing with a situation whereby the petitioners wanted the adjudication process to be stopped in an area known as Ngaremara. In that petition issues of jurisdiction and applicable law arose at the initial stage where the petitioners had sought conservatory orders under a certificate of urgency. In my ruling of 26.7.2017 I stated that;

“At this interlocutory stage this court is not seized of all the full facts as appertains the matter at hand. The pronouncement of rights and interests of the petitioners would therefore have to be determined in the main hearing and not at the interlocutory stage”.

18. In the above mentioned case I had cited the provisions of **Article 40 (6) of the constitution** which stipulates that any property acquired unlawfully can be challenged. Likewise in this case if the process being undertaken is found to be unlawful the same can be declared a nullity. Taking cue from my stand in the above mentioned case I hesitate to grant the prayers sought by the petitioners in their application at this stage. I also hesitate to dismiss the suit noting that the preliminary objection has not been determined on merits. **I direct that the issue raised in the Preliminary objection be canvassed in the main hearing of the petition, while the application of the petitioners is hereby dismissed. Each party to bear their own costs of the application.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 18TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

HON. LUCY. N. MBUGUA

ELC JUDGE